STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals

PEOPLE OF THE STATE OF MICHIGAN,	Supreme Court No. 140775
Plaintiff-Appellant,	Court of Appeals No. 294667
v	Wayne Circuit Court No. 09-015867-01-AR
MARY MANDANA WATERSTONE,	36th District Court No. 09-057635
Defendant-Appellee. /	

AMICUS BRIEF IN SUPPORT OF

140775

PLAINTIFF-APPELLLANT'S APPLICATION FOR LEAVE TO APPEAL

Gary Walker, Chair (P21914)
Prosecuting Attorneys Coordinating Council

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Dated: April 29, 2010

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

Cases

Cases (continued)

Statutes

Other Authorities

Rules

Constitutional Provisions

STATEMENT OF QUESTION

I. **The ethical rules provide under MRPC 1.9 that an attorney who has represented a client may not take actions that are materially adverse to a former client in the same or substantially related matter. MRPC 1.10 provides that lawyers in the same "firm" would also be foreclosed from taking such action, based on the principle of imputed disqualification. Here, an attorney within one division of the Department of Attorney General represented Judge Mary Waterstone in her civil matter, and after the matter was concluded, attorneys within the Criminal Division of the Department charged her criminally in a related matter. Where the divisions at issue were distinct and there was no sharing of information between these attorneys, may the attorneys from the Criminal Division of the Department move forward with her prosecution?**

Appellant's answer: "Yes."

Appellee's answer: "No."

Amicus answers: "Yes."

INTEREST OF AMICUS

The Prosecuting Attorneys Coordinating Council (PACC) was established by 1972 PA 203, MCL 49.101 - 49.111. PACC was established as an autonomous entity in the Department of Attorney General, but is not under the control or supervision of the Attorney General. It has own budget and is recognized as its own employment unit in state government. It is governed by a five-person council, consisting of the President of the Prosecuting Attorneys Association of Michigan (PAAM), three prosecuting attorneys representing jurisdictions of specified population who are elected by the members of PAAM, and the Attorney General. Its mission is to: . . .*keep the prosecuting attorneys and assistant prosecuting attorneys of the state informed of all changes in legislation, law and matters pertaining to their office, to the end that a uniform system of conduct, duty and procedure is established in each county of the state.* [1]

PAAM is a voluntary association of Michigan's 83 county prosecuting attorneys, the Attorney General and US Attorneys serving in Michigan. All employees in their respective offices are also members. PAAM is a registered Michigan corporation, and it has non-profit status under section 501c(3) of the Internal Revenue Code. PAAM is also recognized by statute, with the following duties:

> *It shall be the duty of the prosecuting attorneys' association to keep the prosecuting attorneys of the state informed of all changes in legislation, law and matters pertaining to their office through the department of the attorney general of the state of Michigan, to the end that a uniform system of conduct, duty and procedure be established in each county of the state.*[2]

Due to these overlapping statutes, PACC and PAAM work cooperatively to coordinate best practices and procedures between 83 independently elected offices. Both agencies have a substantial interest in this case because PACC works cooperatively with the members of PAAM

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[1] MCL 49.109
[2] MCL 49.62

to obtain prosecuting attorneys who are willing to accept a special prosecutor appointment under MCL 49.160.

Although the Attorney General is a member of PACC and PAAM, the arguments expressed in this brief belong solely to PACC and PAAM, and no representation should be made or implied that they represent the views of the Department of Attorney General.

STATEMENT OF PROCEEDINGS AND MATERIAL FACTS

Amicus joins the Statement of Proceedings and Facts of the Plaintiff-Appellant, the People of the State of Michigan.

ARGUMENT

I. The Attorney General's statutory duties trump the Michigan Rules of Professional Conduct.

Amicus adopts by reference the Appellant's argument that the Court of Appeals erred in finding that the Department of Attorney General violated MRPC 1.10. Amicus asserts that even if Court of Appeals was correct, the Attorney General's statutory duties trump the MRPC and disqualification of the entire Department is not the remedy.

The resolution of the issue before the court essentially starts and ends with the special prosecutor statute, MCL 49.160. Prior to the enactment of 2002 PA 706 (ESB 115), the authority to appoint a special prosecutor rested with the court. Included in the Appendix at pages 1a - 4a is a copy of the final legislative analyses for ESB 115. As noted in that analysis, there were four main problems with the prior statute:

1. Judicial appointment of an executive official, who may end up prosecuting a case in front of that appointing judge, posed a separation of powers issue.

2. The judge could appoint any attorney to be a special prosecutor. The person did not need to have any prosecution experience, and could even be a practicing defense attorney.

3. The lawyer appointed as a special prosecutor would be paid a fee approved by the appointing judge. In complex cases involving substantial legal work, the fees would be extensive with no control by the county budgeting authority.

4. A judge could only appoint a special prosecutor after criminal charges were issued.[3] This meant the prosecutor with the conflict would be making one of the most important decisions in the case, whether to charge a person with a crime, and the level of that crime.

To address these concerns the legislature passed 2002 PA 706. Following is the text of the enrolled bill, in a format that shows all changes between the prior and current law.

A bill to amend 1846 RS 14, entitled "Of county officers," by amending section 60 (MCL 49.160).

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[3] *In Re Special Prosecutor,* 122 Mich App 632; 332 NW2d 550 (1983).

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 60. (1) If the prosecuting attorney of a county ~~is~~ **DETERMINES HIMSELF OR HERSELF TO BE** disqualified by reason of conflict of interest or is otherwise unable to attend to the duties of the office, ~~the supreme court, the court of appeals or the circuit court for that county, upon a finding to that effect by the court, may appoint an attorney at law as~~ **HE OR SHE SHALL FILE WITH THE ATTORNEY GENERAL A PETITION STATING THE CONFLICT OR THE REASON HE OR SHE IS UNABLE TO SERVE AND REQUESTING THE APPOINTMENT OF** a special prosecuting attorney to perform the duties of the prosecuting attorney ~~in the respective court~~ in any matter in which the prosecuting attorney is disqualified or until ~~such time as~~ the prosecuting attorney is able to serve.

(2) If the ~~prosecuting attorney of a county is disqualified by reason of conflict of interest or is otherwise unable to attend to the duties of the office, the circuit court for that county, upon a finding to that effect by the court, may appoint an attorney at law~~ **ATTORNEY GENERAL DETERMINES THAT A PROSECUTING ATTORNEY IS DISQUALIFIED OR OTHERWISE UNABLE TO SERVE, THE ATTORNEY GENERAL MAY ELECT TO PROCEED IN THE MATTER OR MAY APPOINT A PROSECUTING ATTORNEY OR ASSISTANT PROSECUTING ATTORNEY WHO CONSENTS TO THE APPOINTMENT TO ACT** as a special prosecuting attorney to perform the duties of the prosecuting attorney ~~in the probate court, the district court, or any other court within the county~~ in any matter in which the prosecuting attorney is disqualified or until ~~such time as~~ the prosecuting attorney is able to serve.

(3) A special prosecuting attorney appointed under this section is vested with all of the powers of the prosecuting attorney for the purpose of the appointment and during the period of appointment, **INCLUDING THE POWER TO INVESTIGATE AND INITIATE CHARGES. THE COST OF PROSECUTION, OTHER THAN PERSONNEL COSTS, IN ANY MATTER HANDLED BY A SPECIAL PROSECUTING ATTORNEY SHALL BE BORNE BY THE OFFICE OF THE PROSECUTING ATTORNEY WHO HAS BEEN DETERMINED TO BE DISQUALIFIED OR OTHERWISE UNABLE TO SERVE.**

(4) This section ~~shall~~ **DOES** not apply if an assistant prosecuting attorney has been or can be appointed by the prosecuting attorney pursuant to section 18 of chapter 16 of ~~Act No. 175 of the Public Acts of 1927, being section 776.18 of the Michigan Compiled Laws~~ **THE CODE OF CRIMINAL PROCEDURE, 1927 PA 175, MCL 776.18**, to perform the necessary duties within the constraints of that section or if an assistant prosecuting attorney has been otherwise appointed by the prosecuting attorney pursuant to law and is not disqualified from acting in place of the prosecuting attorney.

Enacting section 1. This amendatory act takes effect February 1, 2003.

2002 PA 706 made the following significant changes:

1. It placed the responsibility for appointing special prosecutors on the Attorney General.
2. **It requires that unless the Attorney General decides to prosecute that case, only a prosecuting attorney can be appointed to prosecute the case.**

3. The Attorney General cannot order a prosecuting attorney to accept an appointment; it is the prosecutor's option to accept one.

4. The appointment of a special prosecutor can be made pre-charge.

5. Expenses of the prosecution are borne by the disqualified jurisdiction, except the personnel costs of the appointed prosecutor's office cannot be charged to the disqualified county.

Shortly after this act was amended the Attorney General met with representatives of the Prosecuting Attorneys Coordinating Council (PACC) and the Prosecuting Attorneys Association of Michigan (PAAM) to determine the best procedures to implement this new law. It was agreed that when a petition for a special prosecutor was received by the Attorney General's Criminal Division, a copy of the petition would be sent to Kim Warren Eddie, PACC Assistant Executive Secretary. Mr. Eddie would then attempt to find a volunteer willing to take the appointment from other prosecutors in the same geographic area. Once a volunteer was obtained, the paperwork appointing the special prosecutor would be processed. As noted from the statistics contained in the Appendix at pages 5a - 6a, neighboring prosecutors generally accept appointment requests. Everyone who accepts a case knows that someday he or she will have a conflict and will need a neighbor to return the favor.

Occasionally the cases are very complex or involve a significant expenditure of resources beyond the run of the mill case. In those cases, as in this one, PACC attempts to find a volunteer, but the resource demands on already overworked prosecutors' offices result in no takers. In those cases, the Attorney General serves as the default prosecutor, or the prosecutor of last resort.

As noted, 2002 PA 706 changed the rules for appointing special prosecuting attorneys. Attorneys in private practice can no longer be appointed by the court to be special prosecutors. PA 706 provides that only the AG or a prosecuting attorney can exercise the awesome prosecution authority of the state. Yet the Court of Appeals holding in this case would negate

this legislative directive. Let's examine the impact of the Court's decision that the Department of Attorney General is a firm subject to disqualification under MRPC 1.10, even when the Attorney General has no personal conflict.

First, as noted in the Appellant's brief, this case started with a special prosecutor request from the Wayne County Prosecuting Attorney because the investigation involved possible criminal activity by Karen Plants, a Wayne County Assistant Prosecuting Attorney, not because of any alleged criminal activity by Judge Waterstone. The Department had no initial reason to screen its cases for a possible conflict with Judge Waterstone. As soon as it became aware of the possibility that Judge Waterstone was a former client, the Department created a conflict wall. There is no evidence that the Department exploited any duty of confidentiality. And even if you accept the Court of Appeals finding that the obligations of a private law firm under MRPC 1.10 can be extended to the unique duties of the Attorney General, amicus submits that there was no violation of MRPC 1.10.

The Department of Attorney General is not a private law firm. When a private law firm has a conflict, it loses a client and a fee, but the client still has legal recourse. The client merely needs to find another attorney. When a vital public duty like criminal prosecution is assigned to the Attorney General, disqualification deprives the public of its only legal recourse. That is because disqualification of the Attorney General, the prosecutor of last resort, equals dismissal of the case. The clear legislative directive in MCL 49.160 is that only the Attorney General or elected county prosecuting attorneys can prosecute criminal cases. If no prosecutor can be found to take the case, and the Attorney General can be disqualified from performing that role, then

justice is denied to the People of Michigan, and to any victim entitled to rights under Const 1963, Art 1, § 24.[4]

The requirements of MCL 49.160 that specify the duties of the Attorney General are substantive provisions of state law governing the authority and actions of a constitutional officer. The MRPC were adopted by the Supreme Court under its authority to govern practice and procedure under Const 1963, Art VI, § 5. Amicus recognizes the importance of the MRPC, and the Court's proper role in governing the ethics of the profession. Amicus submits, however, that the rules governing private law firms cannot cage the statutory duties of the Attorney General. Especially in a case where the Attorney General has no personal conflict, and created a conflict wall and segregated the case information as soon as the conflict was discovered.

In short, the substantive statutory responsibilities of the Attorney General contained in MCL 49.160 must trump a rule of practice and procedure designed to regulate the legal profession.[5] Any other interpretation violates separation of powers, Const 1963, Art III, § 2.

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[4] Amicus also notes that the Attorney General defends hundreds of state employees in civil proceedings every year, including Michigan State Police Department officers and Michigan corrections officers. Unfortunately, some of these cases also involve criminal activity by the state employee. The implications of the Court of Appeals holding extend far beyond the facts of this case.

[5] *McDougall v Schanz,* 461 Mich 15; 597 NW2d 148 (1999).

II. The rule of necessity precludes the court from disqualifying the Attorney General from prosecuting a case when required by MCL 49.160.

If we assume for the sake of argument that the Court of Appeals was correct in finding a violation of MRPC 1.10, then the rule of necessity precludes the extraordinary measure of disqualifying the entire office.

An excellent summary of the common law doctrine of the "rule of necessity" is contained in 39 ALR 1476. The common law rule allows judges and other public officials who serve in a quasi-judicial capacity to perform their judicial or statutory duties, even when they would otherwise be disqualified for a **personal** conflict of interest, if disqualification prevents the judge, tribunal or official from fulfilling vital public duties.

The rationale for this doctrine was well stated by the Supreme Court of North Dakota in applying the rule to the State Banking Board:

> *When challenged, must a board member or the entire board refuse to act, leaving no substitute board and providing no forum for a hearing on the alleged violations of the law? The courts have treated this question as presenting a comparison of wrongs or choices of two evils. When confronted with this problem, the courts have relied upon the so-called "rule of necessity" to require otherwise disqualified officers to serve when no provision has been made for a substitute tribunal.* [6]

Equally illustrative is the following quote from the California Court of Appeals for the 1st District involving a sanitation district board. Note how they apply the rule to public officials, not just judges or tribunals.

> *The common law "rule of necessity" allows public officials to take actions they would otherwise be disqualified from taking by operation of conflict of interest rules if their disqualification would make it impossible for the public agency to fulfill one of its vital public duties.* [7] (emphasis applied)

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[6] *First American Bank & Trust Co v Ellwein,* 221 NW2d 509, 515 (ND, 1974)
[7] *Finnegan v Schrader,* 91 Cal App 4th 572, 582; 110 Cal Rptr 552 (2001)

The rule of necessity was first alluded to in Michigan in *Stockwell v White Lake Township*[8]. In *Stockwell,* the township supervisor asked the township board to remove a person from the position of "moderator". The moderator had refused to pay the supervisor for work done for the township. The Court noted the legislature had a statutory remedy for replacing the supervisor on the township board with another person in conflict cases, so the rule did not apply. In *Champion's Auto Ferry Inc v Public Service Commission*[9], the rule of necessity was applied to the Public Service Commission. The Court of Appeals stated:

> *. . . no other agency, and no court, has been delegated by the Legislature the power delegated to the PSC to regulate water carriers. Accordingly,. . . the rule of necessity precludes recusing the members of the PSC if disqualification would then leave the PSC unable to adjudicate questions otherwise properly presented for its resolution.*[10]

Recently, both this Court and the Court of Appeals affirmed the continuing validity of the rule.[11]

While the rule at common law typically applied to judges or executive or legislative bodies with quasi-judicial functions, the rationale for the rule clearly applies to the prosecution functions of the Attorney General. The Attorney General is the only prosecuting official in the state of Michigan with statewide jurisdiction.[12] Only the Attorney General can intervene in any criminal prosecution in any county in the state.[13] Only the Attorney General can appoint a

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[8] *Stockwell v White Lake Township*, 22 Mich 341 (1871)
[9] *Champion's Auto Ferry Inc v Public Service Commission,* 231 Mich App 699; 588 NW2d 153 (1998)
[10] *Champion's Auto Ferry,* 231 Mich App at 709-710.
[11] *Citizens Protecting Michigan's Constitution v Secretary of State,* 482 Mich 960, 755 NW2d 157 (2008); *Citizens Protecting Michigan's Constitution v Secretary of State*, Court of Appeals order denying recusal motion, issued August 13, 2008. (Docket No. 286734).
[12] MCL 14.28; *Fieger v Attorney General,* 274 Mich App 449, 734 NW2d 602 (2007); *People v Karalla,* 35 Mich App 541; 192 NW2d 676 (1971)
[13] MCL 14.101

special prosecuting attorney under MCL 49.160. **And only the Attorney General can prosecute a case when a special prosecutor cannot be found.**

In short, take the quoted language from *Champion's Auto Ferry, supra,* and substitute Attorney General for PSC.

> *. . . no other agency, and no court, has been delegated by the Legislature the power delegated to the ~~PSC~~ **Attorney General** to ~~regulate water carriers~~ **prosecute cases and appoint special prosecutors**. Accordingly,. . . the rule of necessity precludes recusing the ~~members of the PSC~~ **Attorney General** if disqualification would then leave the ~~PSC~~ **office of Attorney General** unable to ~~adjudicate questions~~ **investigate and prosecute criminal violations of state law** otherwise properly presented for its resolution.*

Or, take the quote from the California Court of Appeals in Finnegan, supra, and substitute Attorney General for public official.

> *The common law "rule of necessity" allows ~~public officials~~ **the Attorney General** to take actions ~~they~~ **he or she** would otherwise be disqualified from taking by operation of conflict of interest rules if ~~their~~ **his or her** disqualification would make it impossible for the public agency to fulfill one of its **vital public duties**.*

What could be more be more vital than holding accountable public officials, including members of the judiciary, who have allegedly committed serious felonies that impact the public's confidence in our criminal justice system.

Disqualification in this case makes it impossible for any public agency to fulfill a vital public duty, and to protect the integrity of criminal trials. The rule of necessity prevents disqualification even when the public official has a substantial personal financial stake in the case. The rule of necessity certainly precludes the disqualification of the office of Attorney General from fulfilling its vital public duties under MCL 49.160, particularly in a situation where the Attorney General has no personal conflict.

III. If any remedy is applicable in this case, the remedy should be limited to exclusion of any statements allegedly obtained in violation of the attorney-client relationship.

The defendant is a lawyer with more than 40 years of experience. She has over 18 years of judicial experience. She had a conversation in her own home with an investigator from the Attorney General's office when he served her with an investigative subpoena. She wasn't in custody or deprived of her freedom of action.[14] She wasn't interrogated.[15] The investigator did nothing to fool or trick her. Under standard constitutional jurisprudence, any statements made during that conversation would be admissible.

Appellant asserts that the defendant was not a target of the investigation at the time she was served the subpoena. Yet, the Court of Appeals ruled that because the investigator did not tell her she was the target of the investigation, any statements made during this conversation were confidential, and required disqualification of all 250 lawyers in the Department of Attorney General under MRPC 1.10. The Court made this finding, not because the attorney-client relationship was still in effect, but because this lawyer of 40 years experience claims that she thought it was.

Amicus submits that the Court of Appeals granted the defendant more protections than they would a high school dropout who is the target of an investigation and who is served with an investigative subpoena.

The investigator was under no obligation to tell her she was a target.[16] He was under no obligation to give her *Miranda* warnings. In short, he did nothing wrong. Again, under standard

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[14] *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 694 (1966); *Yarborough v Alvarado,*541 US 652; 124 S Ct 2140; 158 L Ed 2d 938 (2004).
[15] *Rhode Island v Innis,* 446 US 291; 100 S Ct 1682; 64 L Ed 2d 297 (1980).
[16] *United States v Washington,* 431 US 181; 97 S Ct 1814; 52 L Ed 2d 238 (1977); *People v Hoffman,* 205 Mich App 1; 518 NW2d 817 (1994)

constitutional jurisprudence, the statements would be admissible, and they should be admissible in this case.

Assuming for the sake of argument that the statements were obtained in violation of the attorney-client relationship, and that it was objectively reasonable for the defendant to believe that anything she said to the investigator was protected by that relationship, then, the remedy is suppression of the statements, not disqualification.

If the Attorney General is disqualified, then there is no one who can prosecute this case. Therefore, disqualification means dismissal, and deprives the People of their one fair opportunity to hold the defendant criminally accountable for her actions. Accordingly, Amicus submits that exclusion of any statements that were allegedly obtained in violation of the MRPC, not disqualification of the entire office of Attorney General, would serve to protect the interests underlying the MRPC, while allowing the Attorney General to perform his statutory duties.

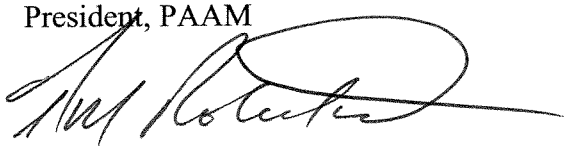
RELIEF SOUGHT

WHEREFORE, Amicus joins the request for relief sought by Plaintiff-Appellant, the People of the State of Michigan, and respectfully requests this Court to grant leave and reverse the Court of Appeals.

Respectfully submitted

Gary Walker (P21914)
Chair, PACC

Brian Peppler (P30307)
President, PAAM



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AMICUS' APPENDIX

Gary Walker, Chair (P21914)
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TABLE OF CONTENTS

SPECIAL PROSECUTING ATTORNEY - S.B. 115: ENROLLED ANALYSIS

Senate Bill 115 (as enrolled) - **PUBLIC ACT 706 of 2002**

Sponsor: Senator Bill Schuette
Senate Committee: Judiciary
House Committee: Criminal Justice
Date Completed: 1-10-03

RATIONALE

In some situations, a county prosecuting attorney might have a conflict of interest that prevents him or her from handling a case. For example, a prosecutor might be related to the victim of a crime, or might have represented the defendant before being elected to office. When a conflict of interest arises, or when a prosecutor is otherwise unable to perform his or her duties, a statutory procedure for the appointment of a special prosecuting attorney applies. This procedure is governed by Chapter 14 of the Revised Statutes of 1846 and case law. Under Chapter 14, the Michigan Supreme Court, Court of Appeals, or circuit court may appoint an attorney as a special prosecuting attorney to perform the duties of the prosecutor in that court. The circuit court also may appoint a special prosecuting attorney to perform the prosecutor's duties in any other court within the county. It has been suggested that this process has some inherent shortcomings: Judicial appointment of an executive branch official may have separation of powers implications; a special prosecutor need not have prosecutorial experience or training; and the statute does not address how to cover the costs of a special prosecutor's activities.

In addition, a 1983 Court of Appeals case, *In Re Special Prosecutor* (122 Mich App 632), held that the provisions of Chapter 14 dealing with appointment of a special prosecutor "do not allow the circuit court to appoint a special prosecutor to perform the duties of the prosecuting attorney in any matters outside of...courts, including the investigation of complaints of a crime or for the purpose of initiating criminal charges". This evidently has led to confusion and inconsistency in the appointment of special prosecuting attorneys in circuit court jurisdictions throughout the State. Since a special prosecutor cannot be appointed until a matter is before the court, a prosecuting attorney may have to decide whether to file a criminal complaint to get the matter before the court even if the prosecuting attorney has a conflict of interest. Some people believe that the procedure for appointing a special prosecutor should be changed to address some of the problems experienced under current law.

CONTENT

The bill amends Chapter 14 of the Revised Statutes of 1846, which deals with county officers, to modify the procedure for appointment of a special prosecuting attorney when a county prosecuting attorney is disqualified by reason of conflict of interest or is otherwise unable to perform duties of the office. The bill takes effect on February 1, 2003.

Currently, if a prosecuting attorney is disqualified for conflict of interest or is otherwise unable to attend to the duties of office, the Supreme Court, the Court of Appeals, or the circuit court for that county, upon a finding to that effect, may appoint an attorney at law as a special prosecuting attorney to perform the duties of the prosecuting attorney in the respective court in any matter in which the prosecuting attorney is disqualified or until the prosecuting attorney is able to serve. Under the same circumstances, the circuit court for that county also may appoint an attorney as a special prosecuting attorney to perform the prosecutor's duties in any other court within the county in any matter in which the prosecutor is disqualified or until he or she is able to serve.

The bill provides, instead, that if the prosecuting attorney of a county determines himself or herself to be disqualified by reason of conflict of interest or is otherwise unable to attend to the duties of the office, he or she must file with the Attorney General a petition stating the conflict or reason for being unable to serve and requesting the appointment of a special prosecuting attorney. If the Attorney General determines that a prosecuting attorney is disqualified or otherwise unable to serve, the Attorney General may elect to proceed in the matter or may appoint a prosecuting attorney or assistant prosecuting attorney who consents to the appointment to act as a special prosecuting attorney to perform the duties of the prosecuting attorney in any matter in which he or she is disqualified or until the prosecuting attorney is able to serve.

The bill specifies that the cost of prosecution, other than personnel costs, in any matter handled by a special prosecuting attorney must be borne by the office of the prosecuting attorney who has been determined to be disqualified or otherwise unable to serve.

The bill retains a provision that vests a special prosecuting attorney with all of the powers of the prosecuting attorney for the purpose of the appointment and during the period of appointment. Under the bill, these powers include the power to investigate and initiate charges. The bill also retains language specifying that the appointment provisions do not apply if an assistant prosecuting attorney has been or can be appointed by the prosecuting attorney to perform the necessary duties and is not disqualified from acting in place of the prosecuting attorney. MCL 49.160

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

The procedure for appointing a special prosecutor has been a problem in Michigan for some time. According to testimony before the Senate Judiciary Committee by an official in the Attorney General's office, the statute governing a special prosecutor's appointment has resulted in a convoluted procedure that sometimes causes an improper appointment. The 1983 Court of Appeals case, *In Re Special Prosecutor*, allows a court to appoint a special prosecutor only in cases that are pending before that court. This means that a special prosecutor lacks the authority to originate a criminal complaint or to coordinate an investigation. Consequently, a prosecutor

who may indeed have a conflict of interest must either assist in the investigation and authorize the criminal charge and then petition the court for the appointment of a special prosecutor, or seek the assistance of the Attorney General in pursuing the case. The first option places the prosecutor in the tenuous position of participating in an investigation and authorizing a criminal complaint even though he or she may have a conflict of interest, and the second option is often impractical because it depends on the caseload and resources of the Attorney General's office.

It stands to reason that a prosecutor should not engage in any aspect of a criminal case if he or she has a conflict pertaining to that case, but the 1983 Court of Appeals opinion prohibits the appointment of a special prosecutor until the case is pending before the court. To deal with the procedural difficulty in complying with statute and case law, some county prosecutors have sought to have a prosecuting attorney from another county review the police reports and make a recommendation to the Attorney General, who then either approves or disapproves the recommended charge. This is an informal procedure and has no statutory basis, so it is possible that this charging process could be challenged in court. In addition, problems arise if the investigating law enforcement agency needs assistance from the prosecutor, such as obtaining a search warrant or subpoena, since the local prosecutor has a conflict of interest and the neighboring prosecutor who is reviewing the case has no jurisdiction. In other counties, courts apparently have simply disregarded the 1983 opinion and have appointed special prosecutors before a case is in court.

By removing the courts from the special prosecutor appointment process, the bill will obviate problems resulting from the current statutory framework for appointment and the Court of Appeals case interpreting that procedure. Since the bill requires that a special prosecuting attorney be appointed by the Attorney General, after a county prosecuting attorney excuses himself or herself and the Attorney General concurs, the appointment may be made before the case reaches the court. Counties will be able to avoid the possible pitfalls of pursuing informal review of cases or disregarding the controlling Court of Appeals decision.

Supporting Argument

Court appointment of a special prosecuting attorney raises questions regarding separation of powers between the judicial and executive branches of government, as constitutionally prescribed. The bill's appointment process removes any separation of powers implications, because the appointment of the special prosecutor will remain in the executive branch and will not be conducted by the judicial branch, as is currently the case.

Supporting Argument

Presently, when a court appoints a special prosecuting attorney, it can name any attorney to that position regardless of whether he or she has any prosecutorial experience or training. Reportedly, in some counties private attorneys are chosen for appointment off the same lists used to appoint defense counsel for the indigent. Although those attorneys may be capable of performing adequately as a prosecutor, there is no standard specified in statute for acting in that capacity. By providing that the Attorney General may proceed in the matter or appoint another prosecuting

attorney or assistant prosecuting attorney to act as a special prosecutor, the bill will ensure that an actual prosecutor serves as a special prosecuting attorney.

Supporting Argument

The law has not addressed how to pay the costs associated with the activities of a special prosecuting attorney. Reportedly, in at least one instance, a judge, sitting as a one-man grand jury, appointed a prominent law firm to serve as a special prosecuting attorney. The special prosecutor evidently conducted an investigation into the activities of an interjurisdictional special narcotics squad and determined that no criminal charges should be brought against members of that police unit. Then, the firm reportedly submitted to the county a large bill for its services in conducting the investigation. The bill addresses this type of situation by specifying that costs of prosecution, except for personnel costs, will be borne by the office of the disqualified prosecuting attorney. The public employee serving as the special prosecuting attorney, then, will continue to be paid his or her own salary from his or her employer, but investigation, administration, and other costs will have to be paid by the county that the special prosecuting attorney serves.

- Legislative Analyst: Patrick Affholter

FISCAL IMPACT

Under State law, the Attorney General supervises the work of prosecuting attorneys and consults and advises prosecuting attorneys in all matters pertaining to the duties of their offices. The Department of Attorney General has stated that the bill will not result in additional costs to the Department. The annual number of prosecutor disqualifications is minimal.

- Fiscal Analyst: Bill Bowerman

This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.

Table of special prosecutor appointments 2006-2010

Year	Special Prosecutors appointed	AG retained cases	Brief Description of AG cases
2006	247	3	Investigation of Gary & Todd Holzhausen (Shiawassee County): Allegations of public corruption (embezzlement & fraud). Holzhausen was the elected Drain Commissioner and his son (Todd) worked for him. Investigation of Timothy Gonzalez (Jackson County): Allegations of misconduct in office on the part of a municipal police officer. People v. Theodore Postula (Chippewa County): Prosecution against sitting County Commissioner for fraud--knowing submission of duplicative expense invoices to county.
2007	213	2	People v. Gary Davenport (Presque Isle County): COA remand for trial court hearing on the issue of conflict of interest and sufficiency of screening process by local office. People v. Fred Paquin (Chippewa County): Defendant was sitting Chief of Tribal Police Department. Prosecution was for assaulting a female acquaintance.
2008	187	5	People v. Kwame Kilpatrick (Wayne County): Defendant was sitting Mayor of the City of Detroit and assaulted two investigators who were attempting to serve process. Investigation of Deanna Kloostra (Kent County): Allegations of threats made to sitting Circuit Court judge. People v. Karen Plants, et al (Wayne County): Prosecution of four officials for actions relating to the use of perjured testimony to secure convictions of two accused drug traffickers.

2008	187	5	People v. Thomas Waligora (Cheboygan County): Homicide case where defendant traveled across upper-Michigan in the middle of the night and brutally beat victim with small baseball bat while he slept. People v. Bell, et al (Wayne County): 3-defendant (two-jury) homicide case flowing from shooting that took place outside Ford High School in the City of Detroit.
2009	224	1	People v. Kimberly Dobbyn (Montmorency County): Complex embezzlement allegations against a local official--matter was eventually placed with a special prosecutor from Alpena who secured a plea agreement with the Defendant.
2010	60	1	People v. Tara Ford (Oakland County): This is a plea-based conviction for embezzlement. The case is back in the trial court on a MCR 6.500 Motion.